FOR ARGUMENT

Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,

Petitioner,

-against-

FRANCES B. DAVIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE FOR THE NEW YORK CITY COUNCIL OF ORGANIZATIONS SERVING THE DEAF, DISABLED IN ACTION OF METROPOLITAN NEW YORK, LTD., NEW YORK CITY MAYOR'S OFFICE FOR THE HANDICAPPED, EASTERN PARALYZED VETERANS ASSOCIATION, UNITED CEREBRAL PALSEY OF NEW YORK CITY, AND THE LEGAL AID SOCIETY OF NEW YORK CITY

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Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir.), cert. denied, 404 U.S. 1006 (1971)..	96
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Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971).....	61
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United States v. American Trucking Association, 310 U.S. 534 (1940).....	62
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Section 504 Proposed Regulation, 41 Fed. Reg. 29566 (July 16,1976).. 54

HEW, Analysis of Final Regulation, 42 Fed. Reg. 22676, 22685, et seq. (May 4,1977) 44,1,55, 58,60,77

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121 Cong. Rec. H11353 (1975).....	76
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Executive Order No. 11914,41 Fed. Reg. 17871 (April 28,1976).....	50
Rehabilitation Services Administration, Program Regulation Guide.....	72
No. 77-4, §§1505.03(b),(c) (Jan.19,1977).....	72
No. 24-2-8, § IV(c) (June,1971).....	72
S. Conf. Rep. No. 455, 94th Cong., 1st sess.54 (1975).....	46
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S.Rep.No.1297,93d Cong.2d sess.(1974).....	30,40,44 46,62,66
Other Sources	
Adler & Williams, Services to Deaf People in the Seventies, in Educational and Psycho-Social Aspects of Deafness (R.Hardy & J.Cull, eds.,1974).....	30,34

	Page
G.Allport, The Nature of Prejudice (1958).....	37
Bennett, A New Issue for Medical Schools: The Handicapped as Physicians, Phila.Inquirer, Nov.12,1978, at 3-M.....	28
P.Blau, Exchange and Power in Social Life (1964).....	40
F. Bowe, Handicapping America (1978).....	42
Burgdorf & Burgdorf, A History of Unequal Treatment: Qualifications of Handicapped Persons as a "Suspect" Class Under the Equal Protection Clause, 15 Santa Clara L. 855 (1975).....	37
Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan.L. Rev. 603 (1975).....	42
E. Collay & A. Bennett, The College Guide for Students with Disabilities (1976).....	35
Cook, Nondiscrimination in Employment Under the Rehabilitation Act of 1973, 27 Am.U.L.Rev. 31(1977).....	41,57
Cook, The Provision of Health and Rehabilitation Services to Disabled Persons Under the Rehabilitation Act, 12 Clearinghouse Rev.693 (1979).....	31

	Page
Comment, Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled, 61 Geo L.J. 1501(1973).....	41
A. Crammatte, Deaf Persons in Professional Employment (1968).....	35,39
Dembo, The Utilization of Psychological Knowledge, in Rehabilitation & Welfare Rev.1 (1970)...	30
L.DiCarlo, The Deaf (1964).....	37
Eastern Paralyzed Veterans Association, Barrier Free Design. The Law (1977).....	6
Environmental Protection Agency, Report presented to the Ear, Nose and Throat Panel of the Food and Drug Administration (June 30,1975).....	35
Fiss, The Fate of an Idea Whose Time has Come: Anti-Discrimination Law in the Second Decade After Brown v. Board of Education, 41 Chi L.Rev.742 (1974).....	44
Gavin, Who Disables the Disabled? 5 Chem. Tech. 716 (1975).....	35
E. Goffman, Stigma: Notes on the Management of Spoiled Identity (1963).....	39
Hessler, College Education for Severely Disabled, 1 American Rehabilitation 29 (1976).....	32

Page

Hetherington, Amplification in The Educational System, in Amplification for the Hearing Impaired 373 (A.Pollack, ed., 1975)..... 36

Karst, Equal Citizenship Under The Fourteenth Amendment, 91 Harv.L.Rev.1(1977)..... 37,40

N. Kittrie, The Right to be Different (1971)..... 37

Laski, Legal Rights in Higher Education, Rehabilitation, and Employment: Some Notes and Thoughts for Disabled Students, in E. Gollay & A. Bennett, The College Guide for Students with Disabilities 3(1976)..... 32

Leslie, Emerging Challenges to the Logic of Selective Admissions Procedures, 3 J.L. & Educ.203 (1974)..... 52

J. Lofland, Deviance and Identity (1969)..... 38

Meadow, Personality and Social Development of Deaf Persons, in Psychology of Deafness for Rehabilitation Counselors (B.Bolton, ed.,1976)..... 29

E.Perrin, Testimony before the Subcommittee on Government Regulation of the Senate Select Committee on Small Business (May 20,1975)..... 35

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Quigley, The Deaf Student in Colleges and Universities, in Educational and Psychological Aspects of Deafness 95 (N.Hardy & J.Cull,eds., 1974)..... 31

J.Raggio, The Disabled and the Elderly: Equal Access to Public Transportation (1975)..... 41

Ramsdell, The Psychology of the Hard of Hearing and Deafened Adult, in Hearing and Deafness (C.Silverman, ed.,3d ed., 1970)..... 39

Rattner, The Way It Looks to Me: Views of an Integrated Student, in The Hearing Impaired Child in a Regular Classroom: Pre-School, Elementary and Secondary Years (1977) 26

The Realization of the Least Restrictive Educational Environments for Severely Handicapped Students, 2 The American Association for the Education of the Severely and Profoundly Handicapped Rev. 195 (1977) 77

Rickard, et al., Indices of Employer Prejudice Toward Disabled Applicants, 47 J.Applied Psych. 52 (1963) 33

M. Rubin, Hearing Aids: Current Developments and Concepts (1976) 29

Sanders, Hearing Aid Orientation and Counseling, in Amplification for the Hearing Impaired 323 (A.Pollack, ed., 1975)..... 39

	Page
E.Schur, Labeling Deviant Behavior: Its Sociological Implications (1971)	38
K.Shein & M.Delk, The Deaf Population of the United States (1974).	23,33,34
J.Simmons, Deviants (1969)	38
Stahler, Underemployment, in The Deaf Man and His World 33 (R.Jones & K.Stevenson, eds. 1969)	34
tenBroek & Matson, The Disabled and the Law of Welfare, 54 Calif. L. Rev. 809 (1964)	38
C.Vann Woodward, The Strange Career of Jim Crow (2d rev. ed. 1966) ..	37
1977 Volta Rev. 403	27
1976 Volta Rev. 300	27
Williams, Is Hiring the Handicapped Good Business? 1972 J. Rehabilitation 30	33
Williams & Sussman, Social and Psychological Aspects of Deaf People, in Counseling with Deaf People (A.Sussman & L. Stewart, eds. 1971)	33
B.Wright, Physical Disability--A Psychological Approach	38

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BRIEF AMICI CURIAE FOR THE NEW YORK CITY COUNCIL OF ORGANIZATIONS SERVING THE DEAF, DISABLED IN ACTION OF METROPOLITAN NEW YORK, LTD., NEW YORK CITY MAYOR'S OFFICE FOR THE HANDICAPPED, EASTERN PARALYZED VETERANS ASSOCIATION, UNITED CEREBRAL PALSEY OF NEW YORK CITY, AND THE LEGAL AID SOCIETY OF NEW YORK CITY

INTERESTS OF AMICI

Pursuant to Rule 40 of the Rules of the Supreme Court,[1] the amici file this brief in support of the respondent, Frances B. Davis, by reason of their substantial interest in the outcome of this

1. Letters of consent to the filing of this brief are being lodged with the Clerk of the Court.

case. Amici are all non-profit organizations having among their purposes the promotion of the civil and human rights of all people with disabilities and the elimination of discriminatory practices against disabled persons in education, employment, housing, public accommodations, and transportation.

Amicus The New York City Council of Organizations Serving the Deaf was founded in 1971 to bring together many well-established organizations of and for deaf persons.[2] The Council works for the

2. These include Eastern Oral Deaf Adults Section--New York City, Ephpheta Society for the Catholic Deaf, Inc., Fanwood Alumni Association, Hebrew Association for the Deaf, International Catholic Deaf Association of New York Chapter #11, International Catholic Deaf Association Chapter #15, JHS #47 Alumni, Knights and Ladies Del'Epee, Maimondes Community Mental Health Center for the Deaf, Mental Health Association of the Deaf, Metro Camera Club for the Deaf, Metro Chapter of the Gallaudet College Alumni Association, New York Catholic Deaf Center, New York Civic Association of the Deaf, New York League for the Hard of Hearing, New York Society for the Deaf, NYRID Metro (Registry of Interpreters for the Deaf), P.T.C. of JHS #47

development of educational, economic, social, cultural, and other opportunities for all hearing impaired persons. Affiliates have been particularly active in the advocacy of improved educational services for hearing impaired children and young adults in New York City. The Council counts as members of its affiliated groups severely deaf persons who are currently engaged in or have completed educational programs in the area of health delivery, including some who are now practicing physicians, dentists, and nurses.

Amicus Disabled In Action of Metropolitan New York, Ltd., is an organization consisting primarily of -- and directed by -- people with disabilities dedicated to improving their legal, social, and economic condition so that they may

Manhattan, St.Ann's Church for the Deaf, St. Francis de Sales School for the Deaf, St. Joseph's School for the Deaf, and Union League of the Deaf.

achieve complete integration into society. Disabled In Action's specific areas of concern include abolishing discrimination against people with disabilities in such areas as education, employment, housing, public accommodation, and transportation; combating paternalistic attitudes toward disabled people by public and private agencies and institutions; and eliminating the social ostracism that separates disabled people from the mainstream of society. Among its other legal advocacy activities, Disabled In Action was one of the amici in Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977), the first decision by a court of appeals to be decided pursuant to section 504.

Amicus New York City Mayor's Office for the Handicapped was established in 1972 in order to create a coordinated, effective effort toward the solution to problems impacting upon the New York dis-

abled community. The Office directs its efforts toward formulating and implementing progressive policies for handicapped persons on behalf of the City Administration; combining the energies and resources of informed citizens, community leaders, professionals, and handicapped citizens themselves in the finding of solutions to pressing problems; developing a comprehensive legislative program fitted to the needs of handicapped persons; providing an accessible, centrally located information, consultation, counseling, and referral service for the City's handicapped persons; coordinating existing programs and services for handicapped citizens within the City Administration; and utilizing all available media in a public education program to inspire an informed and concerned public attitude toward the handicapped community and to inform handicapped citizens of their rights as individuals.

Amicus Eastern Paralyzed Veterans Association was formed thirty-two years ago as a chapter of the Paralyzed Veterans of America. Its main purpose then and today is to ensure that their members are not denied their legal rights. The Association's Legislative and Barrier-Free Design Departments have joined forces with other disability groups in order to ensure the enforcement of federal and state laws and regulations guaranteeing equal rights for disabled citizens in education, housing, public transportation, employment, and access to public buildings and facilities. Recent endeavors have particularly involved section 504 compliance activities. Association staff have provided on-site inspections and technical assistance to dozens of educational institutions in the New York area; prepared a "Fact Sheet on Section 504" for distribution to recipients of federal financial assistance; served as workshop leaders and panelists at

a number of seminars on section 504 compliance; and published a two-volume guide for compliance with the program accessibility requirements of section 504 and other laws, entitled Barrier-Free Design: The Law.

Amicus United Cerebral Palsy of New York City is the area chapter for United Cerebral Palsy of America. The group is active in sponsoring educational, vocational, recreational, and counseling services for persons disabled by cerebral palsy. Present advocacy efforts in the area of education by the organization presently include litigation pursuant to section 504 and the Education for Handicapped Children's Act to eliminate the segregation of students with cerebral palsy by the New York City Board of Education. UCP v. Board of Educ., No. 79 C 560 (E.D.N.Y., complaint filed March 6, 1979).

Amicus The Legal Aid Society is a private, not-for-profit organization incor-

porated under the laws of the State of New York for the purpose of rendering legal representation and assistance to persons in New York City who are without adequate means to employ other counsel. The client population of the Civil Division of The Legal Aid Society includes substantial numbers of persons who are disabled, including many hearing impaired persons, and the questions involved in this case are of great importance to those disabled persons seeking to benefit from programs and activities in receipt of federal financial assistance. The issues raised in this appeal are of vital concern to The Legal Aid Society in its efforts to assist fully disabled persons who are subjected to discrimination. Attorneys from the Legal Aid Society are currently representing indigent disabled persons pursuant to section 504 in class action litigation involving rights to education, New York State Association for Retarded

Children, Inc. v. Carey, Nos. 72 - C-356-57 (E.D.N.Y., slip opinions of September 14, 1978 and February 28, 1979), and employment, Chaplin v. Consolidated Edison Co. of New York, No. 79 Civ. 730 (S.D.N.Y., complaint filed February 14, 1979). They are also serving as counsel to disabled students' groups at Hunter College, New York University, and Yeshiva University, in negotiations to bring postsecondary programs at those schools into compliance with section 504.

All amici thus have an obvious and immediate interest in the issues before this Court.

QUESTION PRESENTED

Whether the court of appeals held correctly that, consistent with the civil rights provisions of the Rehabilitation Act, petitioner must make an individualized determination as to the abilities of a hearing impaired applicant to meet the essential admissions criteria for

petitioner's educational program, without regard to that applicant's hearing impairment?[3]

STATEMENT OF THE CASE

Ms. Frances B. Davis, the respondent herein, is a licensed practical nurse (¶ 5)[4] residing in North Carolina (¶ 2). Ms. Davis has a moderately severe hearing loss in her right ear and a severe hearing loss in her left ear (¶ 7). She wears a hearing aid to assist her hearing (id.). This hearing aid improves her hearing to the outer limits of normal hearing levels (id.). In addition, Ms. Davis is an excellent lip reader and, overall, is skillful in communicating with

3. Questions regarding the availability of a private right of action, of a meaningful administrative remedy that might first have to be exhausted, and of "affirmative relief" as a function of the nondiscrimination mandate of section 504, are adequately addressed in the Brief for Respondent, which positions are adopted by amici by reference.

4. Paragraph numbers refer to the Findings of Fact reported in the district court opinion, 424 F. Supp. at 1342-44.

others (id.).

Ms. Davis applied for admission to the Associate Degree Nursing Program at Southeastern Community College, petitioner herein, for the fall quarter beginning in September, 1974 (¶ 4). She was required to undergo a pre-admission examination by an audiologist in order to determine the extent of her hearing impairment (¶ 7).[5] Relying solely on the audiologist's report,[6] the Executive Director of the North Carolina Board of Nursing advised the College's Director of Nursing that Ms. Davis would be unable to adequately attend to a patient's needs as a registered nurse (¶ 8). Similarly relying on the audiologist's report, as well as the advice of the Board of Nursing that Ms. Davis would never be able to be a regis-

5. The Findings of Fact do not indicate whether all applicants are required to undergo such an examination.

6. The audiologist himself evidently made no recommendation regarding the ability of Ms. Davis to enter the nursing program.

tered nurse, the College denied Ms. Davis' application for admission (¶ 9).

Prior to this decision, neither the Board of Nursing nor the College attempted to determine whether there were any essential criteria for admission that could not be met by this applicant. Nor did they attempt to determine whether there were any specific tasks essential to the program that could not be successfully and safely performed by this applicant. The decision was instead based solely on (1) the bare "findings of the medical tests" conducted by the audiologist (id.), and (2) "their feelings" that a hearing impaired person could never be a registered nurse even if she could complete the program (id.).

Following her receipt of the rejection letter from the College, Ms. Davis asked that this decision be reconsidered (¶10). A committee of nurses reviewed Ms. Davis' file and sustained the decision of

the College (id.). After unsuccessfully requesting that this decision be reconsidered a second time (id.), Ms. Davis instituted the present action.

Witnesses for the College asserted that there might be situations in which a hearing impairment could render a nurse unable to safely attend to the needs of a patient (¶ 8).[7] There evidently was no showing, however, that it would be essential to the successful completion of the education program for a student nurse to be placed in such situations.[8] Nor was there any showing that current levels of

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7. The witnesses raised, for example, the possibility of an operating room nurse being unable to lip read because of the use of surgical masks (¶ 8), totally ignoring the use of auxiliary aids such as see-through masks, and without showing that the experiences of student nurses were coextensive with those of registered nurses.

8. The testimony seemed to indicate that only registered nurses would be faced with the hypothetical situations (¶ 8).

supervision provided to students should not be sufficient to alleviate the College's concerns. Nor was there any showing that the provision of academic adjustments or auxiliary aids could not alleviate the College's concerns. Indeed, far from focusing on Ms. Davis' particular abilities to meet the curriculum requirements of the training programs,[9] the district court concluded "from the testimony that the single major factor in the defendant's refusal to allow admissions [sic] to plaintiff was her projected inability to be licensed as a Registered Nurse after graduation . . ." 424 F. Supp.

9. Petitioner, in its Argument, now attempts to construct additional situations in which hearing impaired registered nurses might not be able to perform adequately, Pet. Bf. at 44 n. 18, and to extend the Findings of Fact with regard to registered nurses to the experience of student nurses, id. at 34. Even if there were testimony in the record supporting these assertions--and there was none--it would be incompetant and irrelevant absent a link to Ms. Davis' specific ability to adequately function in an educational context.

at 1346.[10]

The district court ruled in favor of the College on the basis that Ms. Davis was, as a matter of law, not qualified to participate in the nursing program. Since there was at the time an "absence of prior legal definitions of this term,"[11] the Court felt obligated to "resort to" Webster's Dictionary in order to define "otherwise qualified" to mean that "no person may be excluded from a federally assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap renders the person

10. On this point, too, the testimony was mixed: It was admitted at trial that Ms. Davis, with accommodation, could perform adequately in some fields of nursing. 424 F. Supp. at 1346. No evidence was introduced with regard to the experience of other nursing schools in the education of hearing impaired students. Nor did the College evidence any examples of any deleterious effects upon patients due to the inability of hearing impaired health professionals to adequately meet patients' needs.

11. The interpretive regulation for section 504 was published in the Federal Register on May 4, 1977, antedating the district court's opinion by approximately four months.

unable to fully and effectively participate in the activity." Id. at 1345 (emphasis provided).

A unanimous panel of the Court of Appeals for the Fourth Circuit reversed and remanded on this issue, holding that the College must consider Ms. Davis' application without regard to her hearing disability; i.e., petitioner must evaluate her on the basis of specific abilities in light of her objective qualifications, and must consider the impact of academic adjustments and auxiliary aids on her overall qualifications. 574 F. 2d at 1160, 1162. Basing this holding upon the standard required by the newly promulgated regulation[11] implementing section 504, id. at 1161, the appellate court indicated that the focus instead should be upon the particular abilities of Ms.Davis to safely and effectively meet any essential admissions criterion of the College. Id. at 1160. In making this determination,

"[t]he College may consider such other relevant subjective and objective factors as it deems appropriate..." Id. The court additionally observed that:

> In the medical community, there does appear to be a number of settings in which the plaintiff could perform satisfactorily as an RN, such as in industry or perhaps a physician's office. Certainly the plaintiff could be viewed as possessing extraordinary insight into the medical and emotional needs of those with hearing disabilities.

Id. at 1161 n.6.[12]

Finally, the appellate court noted that the College may be required under the section 504 regulation, in order to avoid discriminatory treatment, to grant some form of "affirmative relief" to Ms.

12. Similar findings have been made in nationwide surveys of deaf persons. Today it is not uncommon to find deaf students performing safely and effectively in health training programs and deaf employees performing safely and effectively in health care professions. See pages 23-28 infra. The need for more disabled persons such as hearing impaired persons in the health professions recognized by the court of appeals has been noted elsewhere.

Davis. Id. at 1162. The district court was then instructed to take evidence, on remand, germane to an appropriate application of the regulation.

SUMMARY OF ARGUMENT

Given the opportunity, hearing impaired students are able safely and effectively to complete the essential educational requirements to be registered nurses. Specific evidence is available from examples of severely disabled persons, including several hearing impaired persons who are members of the amici, and from reports throughout the nation of disabled persons now realizing their potential, educationally and occupationally, despite the entrenched remnents of discriminatory policies and practices that historically have excluded them from full participation in the American experience. Following the leads of other minorities,

disabled persons have demanded--and received--legislative recognition of their need for civil rights guarantees. Statutory protection has come in the form of title V of the Rehabilitation Act of 1973, section 504 of which mandates, inter alia, equal educational opportunities for disabled persons. Section 504 is based squarely upon title VI of the Civil Rights Act of 1964, and extends the rights guaranteed under that title to disabled persons.

The administrative construction of section 504, relied upon correctly by the court of appeals below, requires that a postsecondary institution evaluate applicants on the basis of academic and technical standards, e.g., aptitude tests, grades, or residency requirements. A college may not exclude a student from its program because of its assumptions about the nature of applicants' disabilities vis-a-vis their abilities to undertake particular

activities.

This requirement that admissions committees look beyond the stereotypes associated with various disabilities is supported amply by the legislative history of section 504. In addition, the Rehabilitation Act as a whole, and its legislative history, confirms this mandate. Finally, the consistent judicial construction of section 504 by the federal courts also sustains the holding of the court of appeals.

ARGUMENT

THE COURT OF APPEALS HELD CORRECTLY THAT THE CIVIL RIGHTS PROVISIONS OF THE REHABILITATION ACT REQUIRE THAT PETITIONER MAKE AN INDIVIDUALIZED DETERMINATION AS TO THE ABILITIES OF A HEARING IMPAIRED APPLICANT TO MEET THE ESSENTIAL ADMISSIONS CRITERIA FOR PETITIONER'S EDUCATIONAL PROGRAM, WITHOUT REGARD TO THAT APPLICANT'S HEARING IMPAIRMENT.

Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare, speaking on the floor of Congress in support of a bill that was to become section 504 of the federal Rehabilitation Act, stated the rationale of that law:

> The handicapped live among us. They have the same hopes, the same fears, and the same ambitions as the rest of us.... In their quest to achieve the benefits of society they ask no more than equality of opportunity. But they are faced [13] with continuing discrimination....

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13. 118 Cong. Rec. 3320 (1972). Similar statements were made throughout the legislative history of section 504. See, e.g., 119 Cong. Rec. 24563, 24566, 24587, 24589, 24590 (1973); 118 Cong. Rec. 8976,8977, 35840,35841 (1972).

This legislative purpose informs the decision of the court of appeals below, and requires that the holding of that court be affirmed.

A. Hearing Impaired Students Are Able Safely and Effectively to Complete the Essential Educational Requirements to Be Registered Nurses and Other Health Care Professionals; They Have Been Excluded from these Professions in the Past Because of Discriminatory Educational Opportunities.

The late Chief Justice Earl Warren, writing for this Court in Hernandez v. Texas, 347 U.S. 475 (1954), stated:

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection.

Id. at 478. Hearing disabilities are such a difference -- although community prejudices about hearing, and other, disabled people have been ubiquitous. They are as ancient and persistent as prejudices based

upon race or color. Yet, it has only been in recent times that disabled people have been in a position to seek the Court's and the law's protection.[14]

In this case, Frances Davis asks the Court to enforce the civil rights mandates of the Rehabilitation Act, which pierce the stereotypes associated with hearing disabilities, and which demand that petitioner assess Ms. Davis application for admission on a factual basis, according to her abilities, without regard to her hearing impairment. The College's justifications for its discriminatory action are contradicted by the established fact that presently -- and in increasing numbers -- hearing impaired persons, nationwide, are safely and successfully enrolling in nursing schools, dental schools, and even in medical schools. A report made

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14. It took nearly 200 years and 2,500 decisions before this Court decided its first civil case concerning the legal rights of disabled people. O'Connor v. Donaldson, 422 U.S. 563 (1975).

five years ago based upon the National Census of the Deaf Population states:

> Deaf persons are employed in all principal occupations ....there are fewer deaf lawyers, doctors and dentists--though there are some of each--than would be expected from their numbers in the general population. That there are even a few successful deaf persons in these professions demonstrates that such employment is feasible.

J. Shein & M. Delk, The Deaf Population Of The United States 81 (1974).

Numerous hearing disabled persons, including members or former members of groups represented by amicus The New York City Council of Organization Serving the Deaf, have successfully entered careers as health care professionals.[15] For example, Dr. Phillip Rosenblatt was

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15. Certainly information that there were no hearing impaired persons employed within the health professions or attending health related educational programs would not be relevant. However, the fact that there are such persons amply demonstrates the invalidity of the College's position.

born deaf. He successfully completed medical school and a pathology residency at Jewish Memorial Hospital in New York City. He is now in private practice in Brooklyn. Mary Anne Weeks, R.N., holds a full-time position at New York Hospital, a division of Cornell Medical Center. Her severe hearing impairment did not prevent her from completing a three year nurse-training program, nor from working at her job, which involves rehabilitation nursing. Erica Herzig, R.N., is severely hearing impaired. Yet, she has received her Bachelor of Science degree from the School of Nursing at Columbia University. Dr. Frank Hochman's congenital deafness was not an insurmountable problem at Rutgers Medical School. He is adept at lip-reading and he uses a stethosope with a built-in amplifer. He has since moved to the west coast,

where his pediatric practice at San Jose Hospital includes a patient population that is fifty per cent hearing impaired. His ability to use sign language saves his patients the trouble of writing down their symptoms, a practice that is commonly necessary -- and burdensome -- when hearing impaired patients must rely upon hearing physicians.

Further examples of the successful participation of hearing impaired persons in health related areas are easy to find. For instance, scholarship grantees of the Alexander Graham Bell Association for the Deaf are listed in the organization's newsletter, The Volta Review. Many of the recipients of these grants are successfully participating in educational opportunities that would be closed to them at Southeastern Community College. Maraz Elizabeth Paget of Northampton, Massachusetts, despite a

congenital hearing loss as well as a heart defect, is a sophomore at the University of Massachusetts Nursing School. Steven L. Rattner of Silver Spring, Maryland, a student at the University of Maryland Dental School, is the author of "The Way It Looks to Me: Views of an Integrated Student," a chapter in The Hearing Impaired Child in a Regular Classroom: Preschool, Elementary, and Secondary Years. Having completed her second year at Emory University School of Medicine in Atlanta, Susan Feder's professor of anatomy said he would rank her among his top three students in terms of competence. Ms. Feder uses an electronic stethoscope to compensate for her hearing loss. Ann Keenan Ogden, R.N., from Rosalia, California, was severely deafened as a result of chicken pox at the age of three. Ms. Ogden works in the advanced care and rehabilitation unit at Memorial Hospital Medical Center in Long Beach, California

with patients, age 18 to 100 years, who are learning to cope with the effects of total joint implantation, stroke, paraplegia, and quadriplegia. As a staff nurse, she is responsible for patient care and treatment, which includes communication with patients and their families in an attempt to meet psychological and spiritual, as well as physical, needs. She is a graduate of a three-year program at St. Anthony's School of Nursing in Rockford, Illinois.
1977 Volta Rev. 403; 1976 Volta Rev. 300.

Similarly, persons with other severe disabilities have achieved success in various health professions that the stereotyped image of those disabilities would deny them. David Hartman, M.D., for example, is currently pursuing his psychiatric residency at the University of Pennsylvania Hospital. Mr. Hartman is totally blind. Yet he successfully pursued the full four-year curriculum,

including assistance with pre- and post-operative care, at Temple University Medical School. See Bennett, A New Issue for Medical Schools: The Handicapped as Physicians, Phila. Inquirer, Nov. 12, 1978, at 3-M.

Sheila Braunstein is studying to become a physician at the University of Southern California School of Medicine despite the fact that she will spend the rest of her life in a wheelchair due to an injury to her spinal chord. See id.

Joseph Panzarella, M.D., has been a quadraplegic since the age of two. He is one of the staff physicians at Brunswick Hospital, Amityville, New York, and is also affiliated with Franklin General Hospital, Valley Stream, New York. He specializes in rehabilitative medicine, and teaches a course in that subject at New York University Medical School. Dr. Panzarella was recently named "Physician of the Year" by the American Medical Association.

Thus, the facts now indicate that hearing disabled persons, and other severely disabled persons, can safely and effectively pursue educational programs in the health professions. Indeed in recent years the number of hearing impaired persons enrolling in post-secondary institutions, including health-training programs, has mushroomed. This results partially from the significant improvements in the technology of hearing aids[16] and partially from the change in emphasis in the

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16. Hearing aids have been improved dramatically within the past decade. As technology continues to develop, "about every five years a complete revolution is accomplished." M. Rubin, Hearing Aids: Current Developments and Concepts xiii (1976). In addition, hearing impaired children are being identified much earlier and professionals are concerning themselves with their habilitation much sooner. See Meadow, Personality and Social Development of Deaf Persons, in Psychology of Deafness for Rehabilitation Counselors 67, 68 (B. Bolton, ed., 1976).

service provision sections of the federal Rehabilitation Act of 1973 in giving priority vocational services to those disabled persons who have severe disabilities, including hearing impaired persons.[17] Perhaps the most

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17. As early as 1943, Congress included higher education within the concept of rehabilitation. See Pub L. No. 78-113. That law defined "vocational rehabilitation" and "vocational rehabilitation services" as "any services necessary to render a disabled person fit to engage in a remunerative occupation" Id. In fiscal year 1975, sponsorship in college programs accounted for over forty percent of vocational rehabilitation expenditures for training services, nationwide. Hearing impaired persons, among other groups of disabled persons, have been thought to be too severely handicapped to effectively benefit from rehabilitation services. See Adler & Williams, Services to Deaf People in the Seventies, in Educational and Psycho-Social Aspects of Deafness (R. Hardy & J. Cull, eds., 1974). Rehabilitation caseworkers often have been disposed to divide their clients into what they consider promising or hopeless cases, directing their efforts toward the former group which usually does not include hearing impaired persons. See generally Dembo, The Utilization of Psychological Knowledge, in Rehabilitation & Welf. Rev. 1 (1970). In

significant factor, however, is what one commentator has labeled the Zeitgeist -- the spirit of the times.[18] Demands for nondiscriminatory admission requirements at colleges and universities followed from the demands by other minority groups for economic and social justice, including equal access to edu-

the Rehabilitation Act of 1973, on the basis of its finding that such practices were not justified, Congress required that priority be given in vocational rehabilitation services, including sponsorship in higher education programs, to severely handicapped persons. 29 U.S.C. §§ 701(1),721(a)(5), 741(a),750(a),762(a),772(b),774(b). The Act includes "deafness" in its definition of severe handicap. Id. at § 706(12). Thus, the Rehabilitation Act of 1973 demonstrates that Congress had firmly in its consciousness the counter-stereotype fact that severely disabled persons can successfully participate in educational programs such as that offered by the petitioner. See Cook, The Provision of Health and Rehabilitation Services to Disabled Persons Under the Rehabilitation Act, 12 Clearinghouse Rev. 693, 698-99 702 (1979).

18. Quigley, The Deaf Student in Colleges and Universities, in Educational and Psychological Aspects of Deafness 95, 96 (R.Hardy & J. Cull, eds., 1974).

cational opportunities at all levels. While the initial demands came mostly from black persons, other minorities, including deaf persons and other disabled groups became part of this movement.[19] They began to recognize that when disabled persons are subjected to discrimination in the provision of

19. Id. at 97. It was the disabled students programs initiated in the late sixties at several colleges and universities that established the critical mass of persons needed to address the issues of communication, mobility, and attitudinal barriers confronting students on campuses. The ability of disabled students to join together and deal effectively with these and other issues, has, in turn, given rise to their advocacy efforts and participation in projects directed towards influencing and changing conditions on college campuses and in the community. Thus, higher education for handicapped persons is not only of value to such individuals themselves, but also must be considered a matter of top priority for the multitude of unsatisfied needs of handicapped persons in general. See Laski, Legal Rights in Higher Education, Rehabilitation, and Employment: Some Notes and Thoughts for Disabled Students, in E. Gollay & A. Bennett, The College Guide for Students with Disabilities 3 (1976); Hessler, College Education for the Severely Disabled, 1 American Rehabilitation 29, 31 (1976).

educational services and activities, the effect is often that they are underemployed throughout their lives. See Sen. Rep. No. 1297, 93rd Cong., 2d sess. 36 (1974).[20] It is significant

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Although a number of studies have found employers, because of invalid assumptions, reluctant to hire hearing impaired workers for any jobs, see e.g., Rickard, et al., Indices of Employer Prejudice Toward Disabled Applicants, 47 J. Applied Psych. 52 (1963) (deafness rated as worse than tuberculosis or mobility impairment requiring use of wheelchair); see also Williams, Is Hiring the Handicapped Good Business? 1972 J. Rehabilitation 30, the more serious concern is that of underemployment. See J. Schein & M.Delk, supra page 23 ,at 84-85 (noting correlation between lack of education and underemployment among deaf workers); Williams & Sussman, Social and Psychological Problems of Deaf People, in Counseling with Deaf People (A. Sussman & L. Steward, eds., 1971) ("employed deaf people are very often seriously underemployed....we find deaf men and women of normal or above average abilities operating automatic machines, performing simple assembly line operations, or otherwise occupied in unchalleging routines. This stereotyping illustrates the inadvertent discriminatory attitudes toward deaf job applicants that are inevitable among slightly informed professionals when relating to this or another small minority

to note that although these individuals as a whole constitute well over ten percent of the population of the United States, id at 34, disabled persons, a significant number of whom have hearing disabilities,[21] make up a very negligible

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that has very complex characteristics."); Stahler, Underemployment, in The Deaf Man And the World 33 (R. Jones & K Stevenson, eds., 1969) ("The deaf... quickly reach a plateau, and there they remain. As a result, underemployment is so prevalent as to become a major problem for most deaf people who are capable and interested in working....").

21.

Approximately five percent of the total population in this country are persons handicapped by a significant bilateral hearing loss. About two million of them cannot hear and understand conversational speech. The ongoing National Census of the Deaf Population, which defines a deaf person as one who has lost, or never had, the ability to hear and understand speech through the unaided ear, such loss to have occurred prior to nineteen years of age, tentatively reports a prevalence rate for deafness of two per one thousand. It is estimated there are over 450,000 individuals who fit into this category. See J. Schein & M. Delk, supra page 23; Adler & Williams, supra note 17. Thus, hearing impairment is "one of the most prevalent

percentage of the students at colleges and universities. The even greater limitation on the number of disabled individuals in graduate and professional schools dramatically explains their limited participation in the economic life of the nation.[22] Thus, the recent history of the drive to eliminate discrimination in education on the basis of race and sex provides a firm foundation to build

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chronic conditions in the United States." Testimony of E.B. Perrin before the Sub-Committee on Government Regulation of the Senate Select Committee on Small Business (May 20, 1975). In addition, because of environmental factors, the incidence of nerve loss which causes hearing impairment in the general population seems to be increasing. Report of the Environmental Protection Agency, presented to the Ear, Nose and Throat Panel of the Food and Drug Administration (June 30, 1975).

22. Gavin, Who Disables the Disabled? 5 Chem. Tech. 716 (1975); E.Collay & A. Bennett, supra note 19. The underrepresentation of deaf persons in professions that require advanced degrees has been documented in A. Crammatte, Deaf Persons in Professional Employment (1968).

upon in the effort to eliminate discrimination on the basis of disability. See Adams v. Richardson, 480 F.2d 1159 (D.D.C.1973). To the extent that education significantly affects hearing disabled persons' outlook toward and station in society, equality in the provision of educational opportunities would seem to be fundamental to that equality in other areas of life.[23] However, hearing disabled persons have been looked upon historically as being less deserving of the benefits of education.[24] Those training opportunities that have existed have been largely con-

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23. See, e.g., Hairson v. Drosick, 423 F. Supp. 180, 183 (S.D.W.Va.1976).

24. Such prejudice dates back to ancient Greece, when Aristotle prescribed death for hearing impaired offspring because of his assumption that there was a common organic relationship between hearing impairments and speech impairments, and that hearing impaired persons were incapable of education. See Hetherington,

fined to institutionalized settings, so that hearing impaired persons have been forced to submit to segregation in order to learn even a minimal way of life. The same era that invented Jim Crow laws to segregate people by race provided institutions for hearing impaired persons and other disabled persons -- and in a remarkably similar spirit.[25] These attitudes unfortunately remain with us today. Studies designed to

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Amplification in the Educational System, in Amplification for the Hearing Impaired 373 (A. Pollack, ed., 1975); Burgdorf & Burgdorf, A History of Unequal Treatment: Qualifications of Handicapped Persons as a "Suspect" Class Under the Equal Protection Clause, 15 Santa Clara L. 855, 883-84 (1975).

25. Compare C. Vann Woodward, The Strange Career of Jim Crow, vii-viii, 94-96, 97ff. (2d rev. ed. 1966) with Burgdorf & Burgdorf, supra note 24, at 887. See L. DiCarlo, The Deaf 29-42 (1964). See also N. Kittrie, The Right to Be Different 56-58, 308-35 (1971); G. Allport, The Nature of Prejudice (1958); Karst, Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L.Rev. 1,5-8, 9-10 (1977).

measure the degree of social distance that people keep between themselves and particular groups have found a strong association between intolerance toward racial minorities and intolerance toward disabled persons.[26] Hearing impaired persons especially are subjected

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26. See, e.g., J. Simmons, Deviants 27-32 (1969). For the unaccustomed, interactions with disabled persons instill apprehensions that, in turn, produce reactions defining them as a sub-class of social deformity. See E. Schur, Labeling Deviant Behavior: Its Sociological Implication 109 (1971). See also J. Lofland, Deviance and Identity 13-15 (1969). Psychological studies indicate that the reason for such a reaction is simply a fear springing from ignorance or lack of contact with disabled persons. B. Wright, Physical Disability-- A Psychological Approach 264-65 (1960). It is easy to classify all persons evincing conspicuous differences as physically "defective" and sociologically "deviant." Such classifications represent no more than the vestiges of the more blatant biases of earlier societies. See notes 24 & 25, supra; tenBroek & Matson, The Disabled and the Law of Welfare, 54 Calif.L.Rev. 809,813 (1964).

to the same type of stigma experiences as are ethnic minorities and aliens.[27] The standard perception of hearing persons is that hearing impaired, and other disabled persons do not have the ability to offer rewarding contributions to the

27. Language difficulties of hearing impaired persons are usually assumed to be an indication of a lack of intelligence. A. Ciammatte, supra note 22, at 8. The wearing of hearing aids is especially looked upon by many hearing impaired people as a "stigma symbol" -- i.e., the different treatment they receive when they wear their hearing aids causes hearing impaired persons to be aware of what others consider to be an inferior condition. This causes hearing impaired persons to internalize the idea that they are indeed inferior. Sanders, Hearing Aid Orientation and Counseling, in Amplification for the Hearing Impaired 323, 343 (A.Pollack, ed., 1975); Ramsdell, The Psychology of the Hard of Hearing and Deafened Adult, in Hearing and Deafness (C. Silverman, ed., 3d ed., 1970). See E. Goffman, Stigma: Notes on the Management of Spoiled Identity 7,104 (1963). Stigma terms, such as "deaf and dumb," are still commonly verbalized as a source of metaphor and imagery, without thought to their actual definitions. Thus, a wide range of imperfections are imputed on the basis of a single impairment. Id. at 5,115.

community through social interaction.[28] Yet hearing disabled organizations have been politically weak and unable to coalesce with other disabled groups as a potent force to utilize the political system to actively change these perceptions.[29]

28. See Karst, supra note 20, at 6-10 See also P. Blau, Exchange and Power in Social Life (1964).

29. The Senate Report on the Rehabilitation Act Amendments of 1974 stated:

> More than any other minority group, individuals with handicaps have been affected by policy decisions at every level of government which are developed all too frequently without their continued participation. Until this Nation has the foresight to include in all of its planning the need to make all areas of society accessible and usable to individuals with handicaps, they will continue to be excluded and will have little or no opportunity to achieve their basic human right of full participation in life and society.

S. Rep. No. 1297, supra page 33, at 24: Further, it has been noted that:

> [D]isabled persons have generally a poor and meagre press. They are victims of a social science elitism that makes the dullest academic

Although discriminatory practices certainly occur in many arenas,[30] such treatment is perhaps more harmful when it develops in the context of education, the conduit through which the means to live in a democracy have traditionally been provided. See Brown v. Board of Education, 347 U.S. 483 (1954). That, at least, is the legislative judgment -- by voting section 504 into existence Congress recognized the enormity of the problem of disability discrimination in higher education and the urgency of implementing broad re-

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exercise on disability more publishable than an account of the pressing needs of handicapped persons.
J. Stubbins, Social and Psychological Aspects of Disability 9 (1977).

30. See generally J. Raggio, The Disabled and the Elderly: Equal Access to Public Transportation (1975); Cook, Nondiscrimination in Employment Under the Rehabilitation Act of 1973, 27 Am. U.L. Rev.31 (1977); Comment, Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled, 61 Geo.L.J. 1501 (1973).

forms in order to enable hearing impaired people -- and all disabled people -- to be defined, as a matter of public policy, by their abilities, and not by their disabilities.[31]

B. Section 504 Prohibits Petitioner from Denying Admission to a Hearing Impaired Applicant Absent a Determination as to the Abilities of that Applicant to Complete the Essential Admissions Criteria for Petitioner's Educational Program, Without Regard to that Applicant's Hearing Impairment.

In the exercise of its powers under § 5 of the fourteenth amendment to enforce equal protection of the laws,[32] Congress passed title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d(1970), in order to

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31. See F. Bowe, Handicapping America 24 (1978).

32. Katzenbach v. Morgan, 384 U.S.641, 648 650 (1966); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Constructors Association of Western Pennsylvania v. Kreps, 573 F.2d 811, 816 n.12 (3d Cir. 1978). See also Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan. L. Rev. 603 (1975).

assure that equal education opportunities were not denied on the basis of race, color, or national origin.[33] Similarly, Congress guaranteed equal educational opportunities for women with the adoption of title IX of the Education Amendments of 1972. 20 U.S.C.§1681 (West Supp. 1977).[34] In 1973, acting with

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33. Title VI provides:

> No person in the United States, shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

34. Title IX provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or subjectected to discrimination under any education program or activity receiving Federal financial assistance.

With both title VI and title IX, the issue is civil rights, and the battle

the same clear purpose, Congress enacted section 504, 29 U.S.C. §794, popularly known as the Disabled Persons' Civil Rights Act. Congress used exactly those words used in title VI and title IX, and extended the equality guarantee therein[35] to include

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to claim the rights guaranteed under those statutes has recently been fought before this Court. See Board of Regents of the Univ. of Cal.v. Bakke, 98 S.Ct. 2733 (1978); Cannon v. Univ. of Chicago, 559 F. 2d 1063 (7th Cir.1976), cert. granted, 98 S. Ct.3142 (1978), argument reported, 47 U.S.L.W. 3471 (Jan.16,1979).

35. See, e.g., Regents of the Univ. of Cal. v. Bakke, 98 S.Ct. 2733, 2745 (1978)(Powell J.) Bossier Parrish School Board v. Lemon, 370 F.2d 847, 852 (5th Cir.1967), cert. denied, 388 U.S. 911 (1967); United States v. Jefferson County Board of Educ., 372 F. 2d 836, 848 (5th Cir.1966). See generally Fiss, The Fate of an Idea Whose Time Has Come: Anti-Discrimination Law in the Second Decade After Brown v. Board of Education, 41 Chi. L.Rev. 742,771 (1974).

The legislative history of section 504 shows the explicit intention of Congress to impose by statute the same guarantees of equal protection required by title VI and title IX. See, e.g., S.Rep.No.1297 supra page 33, at 18-19; 120 Cong. Rec. 30551 (1974). See also 42 Fed. Reg.22676 (May 4, 1977). This legislative intent was

all handicapped individuals. Section 504 provides:

> No otherwise qualified handicapped individual in the United States, as defined in §706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....[36]

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recently codified in section 120 of the 1978 amendments to the Rehabilitation Act, which provide that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available... under section 504...." Pub. L. No. 95-602, 92 Stat. 2983 (to be codified under 29 § U.S.C. §794a(a)(2))(Nov. 6, 1978).

Thus, the same high standard of review applied to classifications based upon race, color, religion, and national origin under title VI must be applied to classifications based on handicap under section 504. Indeed, the federal courts have already noted that section 504 "closely tracks" title VI. Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1280-84 (7th Cir. 1977), cited with approval in Regents v. Bakke, 98 S. Ct. at 2744 n.16 (Powell, J.), 2815 n. 27 (Stevens, J) ; Accord, Sherer v. Waier 457 F.Supp.1039,1044 (W.D.Mo.1978) ("similarity of § 504 to § 601...was not accidential"); Barnes v. Converse College, 436 F. Supp. 635, 638 (D.S. Car. 1977) (title VI and section 504 "substantially identical"); Halderman v. Pennhurst State School and Hosp., 446 F.Supp.1295, 1323-24 (E.D. Pa.1977); Crawford v. University of North Carolina, 440 F.Supp. 1047, 1055 (M.D.N.C. 1977); Drennan v. Philadelphia Gen. Hosp., 428 F.Supp. 809, 815 (E.D.Pa.1977). As Senator Humphrey, floor manager of the Civil Rights Act of 1964, said of title VI during debate, quoting President Kennedy's message forwarding the Act:

> simple justice requires that public funds...not be spent in

> any fashion which encourages, entrenches, subsidizes or results in racial discrimination.

110 Cong. Rec. 6543 (1964) (emphasis supplied), quoted with approval in Regents v. Bakke, 98 S.Ct. at 2811 n.16 (Stevens, J.).

The only exception to this principle is that title VI exempts from its coverage some forms of employment discrimination, see 42 U.S.C. § 2000d.(3), whereas section 504 contains no exemptions, and, indeed, has as its basic purpose the expansion of opportunities in all areas of employment, as well as education. See S.Rep.No. 1297, supra page 33, at 16-19; 119 Cong. Rec. 24563,24566,24563 (1973); S.Conf. Rep. No. 455, 94th Cong., 1st Sess.54 (1975). See also Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-17 (1975) (courts are to look to the "large objectives of the Act"); A.H. Phillips v. Walling, 324 U.S. 490, 493 (1945 (exemptions from remedial legislation must be narrowly construed). But see Trageser v. Libby Rehabilitation Center, 18 F.E.P. Cases 1141 (4th Cir. 1978).

36. Section 706(6) defines "handicapped individual" as:

> [A] person who (A) has a physical or mental impairment which sub-

The court of appeals held that section 504 requires "that the college must reconsider plaintiff's application for admission to the nursing program without regard to her hearing disability," 574 F.2d at 1160, indicating that it was simply unnecessary for petitioner to look beyond Ms. Davis specific abilities -- it could utilize any "relevant subjective and objective factors as it deems appropriate,"[37] -- so long as it did not exclude her from its program because of her handicap. Id.

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stantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.

29 U.S.C. §706(6). It is unquestioned that respondent falls within this definition. Pet. Bf. at 8 n.1 ;424 F.Supp. at 1345.

37. Utilization of such factors must be "consonant of course with a fair and essential uniform application of those same subjective and objective factors utilized in the consideration of other candidates for enrollment in the nursing program." 574 F.2d at 1160.

In enacting section 504 Congress required that discrimination against disabled people in educational programs be ended, and prohibited exclusions of disabled persons from educational programs because of stereotyped assumptions about their inability to participate in such programs.

These commands of section 504 when applied to the facts of this case require precisely the judgment and relief ordered by the court of appeals below, that petitioner evaluate Ms. Davis' qualifications without "considering the nature of the plaintiff's handicap in order to determine whether or not she was otherwise qualified for admittance to the nursing program...."
574 F.2d at 1161.

The predicate of Congressional enactment of section 504 was Congress' recognition of the competences of disabled

people and of the conditions necessary to the realization of their competences and to their participation as equal citizens. The Congress acknowledged the principles of normalization and acted upon them. It understood and indeed intended that section 504 would open educational opportunities heretofore closed and would require new services. Exclusion of disabled people from such opportunities was the evil Congress legislated to overcome, as the administrative construction of Section 504, the legislative history of section 504, the purpose and history of the Rehabilitation Act as a whole, and the consistent judicial construction by the federal courts of section 504 all demonstrate.

1. The Administrative Construction of Section 504

The construction of section 504 by the Department of Health, Education and

Welfare in its regulation,[38] 45 C.F.R. part 84, shows that section 504 was intended to end discrimination due to stereotyped conceptions of the abilities of disabled persons[39] by prohibiting the exclusion of disabled persons from educational programs without the showing, on a factual basis, that they are unable to meet the standards requisite to admission to those programs without regard to their disabilities.

38. Exec.Order No.11914, 41 Fed.Reg. 17871 (April 28, 1976) assigns to HEW responsibility to set standards and guidelines for section 504. As a contemporaneous administrative interpretation of a statute this regulation is entitled to great weight. Udall v. Tallman, 380 U.S.1, 16 (1965); Rosado v. Wyman, 397 U.S. 397, 415 (1970).

39. Secretary Califano's statement when he signed the regulation was:

> The Section 504 Regulation attacks the discrimination, the demeaning practices and the prejudices that have afflicted the nation's handicapped citizens. It reflects the recognition of the Congress that most handicapped persons can lead proud and productive lives, despite their disabilities. It will usher in a new era of equality for handicapped individuals in which unfair barriers to self-

According to the HEW regulation, issued May 4, 1977:

> Section 504 was intended to forbid discrimination against all handicapped individuals. Section 504 ... represents the first Federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap ... 42 Fed. Reg. 22676.

The regulation, under the title "Discriminatory actions prohibited," clearly states:

> A recipient, in providing any aid, benefit or service may not ...
>
> (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
>
> (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others ....

45 C.F.R. § 84.4(b)(1).

Under subpart E, regulating postsecondary

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sufficiency and decent treatment will begin to fall before the force of law ... In Section 504, the Congress enacted a charter of equality to help end the shameful national neglect of handicapped individuals and to translate many of their legitimate ends into legal rights....

education, this mandate is put forth even more clearly and specifically:

> Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

Id. §84.42(a).[40]

> "Qualified handicapped person" means...[W]ith respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity....

Id. §84.3(k)(3)

The College, far from disputing the validity of any of these regulatory provisions, merely contends that Ms. Davis fails

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40. Especially in light of the increasing types of employment opportunities with various degree requisites, discriminatory admissions policies are of major concern to disabled students applying to postsecondary institutions. See generally Leslie, Emerging Challenges to the Logic of Selective Admissions Procedures, 3 J. L. & Educ. 203 (1974).

to meet the regulation's definition of "qualified handicapped person" because of the very nature of her disability. However, it is clear from the regulation that the College, in assessing Ms. Davis' qualifications, must focus on her ability to meet petitioner's established standards. The College has failed to meet the dictates of the regulation in this regard.

In addition, the College ignores a further section of the post-secondary education subpart of the regulation that flatly says:

> Admissions. In administering admission policies, a recipient to which this subpart applies...may not make preadmission inquiry as to whether an applicant for admission is a handicapped person....

Id. § 84.42(b)(4) (emphasis provided). Reading these provisions of the regulation together, it is clear that in determining

whether a applicant is a "qualified handicapped person," a college may not consider the nature of the disability itself. It may, however, consider the ability of an applicant to safely and effectively meet the requirements of a particular program. In its analysis of these provisions of the regulation, "which describes the basis and purpose of [the] sections," 42 Fed. Reg. 22677, HEW underscores this point. An earlier, proposed version of the regulation had permitted such inquiries when used in nondiscriminatory manner.[41] However,

> Revised §84.42(b)(4) generally prohibits preadmission inquiries

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41.

The proposed version read:

> A recipient....may make pre-admission inquiry as to whether an applicant for admission is a handicapped person in order to comply with this part but may not use the results of the inquiry in a manner which results in discrimination on the basis of handicap.

41 Fed. Reg. 29566 (July 16, 1976).

as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of §84.14 on preemployment inquiries.

42 Fed. Reg. 22692 (May 4, 1977). The official analysis of section 84.14 states:

> The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job-related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license (if that is a necessary qualification for the position in question). Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job withqut endangering other employees.

42 Fed. Reg. 22689 (emphasis provided). HEW revised the pre-employment and pre-admission inquiry sections to provide for absolute prohibitions, save in the case

of remedial or affirmative action programs,[42] on the basis of its adoption of the position taken by handicapped persons that "such inquiries are

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42. This exception was incorporated in order to resolve policy conflicts arising from the fact that some schools may want to aid or favor disabled applicants--for example, in order to produce a more diverse student body, see Board of Regents v. Bakke, 98 S.Ct. at 2760 (Powell, J.), or to compensate for past discrimination, see, e.g. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) --while others should be blocked from obtaining information that will only set in operation explicit or unconscious biases. The regulation seeks to strike an appropriate balance by limiting pre-admission inquiries to those necessary for use in carrying out affirmative action programs and remedial obligations. 45 C.F.R. § 84.42(c)(1). Furthermore, to avoid discouraging applications, any educational institution making such inquiries must make clear that this information is sought on a totally voluntary basis, that it will be kept confidential, and that refusal to provide it will not subject the applicant to any adverse treatment. Id. § 84.42(c)(2). The regulation also allows inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation. Id. § 84.42 (b)(4).

often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests,"[43] and on the basis of its rejection of assertions by funding recipients, who had unsuccessfully argued that "inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping

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43. It has been judicially recognized that inquiries concerning an applicant's physical condition frequently result in exclusion of applicants from consideration without a determination as to their particular qualifications. Spencer v. Toussaint, 408 F.Supp. 1067, 1073 (E.D.Mich. 1976) (defendant's policy of conducting pre-employment inquiries not only hindered prospects of disabled persons for employment, but may have caused current employees to avoid seeking treatment in order to avoid becoming stigmatized). Similarly, various state civil rights statutes prohibiting discrimination on the basis of handicap have voided pre-employment inquiries. See, e.g., Milkosky v. American Smelting & Ref. Co., No.EV034B-8297 (N.J.Dep't Law & Pub. Safety, Feb. 15,1974). See also Cook, supra note 30, at 73-75.

condition, and accommodations that might be required."[44] Id.

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44. Non-disabled persons -- even some of the more sensitive ones -- often confuse this critical point. Thus, the question is heard frequently, in various forms: "What is the difference between asking if a person is disabled and asking if a person has abilities?" There is a difference, which section 504 recognizes. By pinning a label such as "crippled," or "retarded," or "blind," or "deaf," onto a person, a number of assumptions are triggered, some possibly based in fact, some perhaps not. See pages 35-41 supra. Far from "repeal[ing] all or any reasonable ... qualification standards," Pet. Bf. at 36, Congress has simply eliminated a procedure that is "often used to discriminate," yet not "necessary to determine qualifications [or] safety hazards." HEW, Analysis, supra. That such is the case may be seen upon careful consideration of the College's attempt at invoking the spectre of the blind bus driver, and its accompanying contention that the holding of the court of appeals would require such results. Pet. Bf. at 41. There are two ways a federally funded bus company could proceed in such a situation. The first would be to ask applicants whether they are blind. The second would be to ask applicants whether they have the ability to drive a bus (or to test for that ability). Obviously the result obtained is the same with both procedures, and there will be no blind bus drivers

Finally, "the single major factor," in the College's rejection of Ms. Davis, to wit "her projected inability to be licenced as a Registered Nurse after graduation," 424 F. Supp. at 1344, is also prohibitted by section 504. As the regulation makes clear, a college "may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity." 45 C.F.R. §84.43(c). The HEW analysis indicates the purpose of this provision:

> This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as assumptions by the recipient that no job

even though the first approach is impermissible. However, in other situations, such as that presented in this case, the results obtained would differ, as per the congressional purpose to expand opportunities for disabled persons by eliminating stereotypes associated with their disabilities.

> would be available in the area in question for a person with that handicap.

42 Fed. Reg. 22692. See also 45 C.F.R. §84.10(b).[45]

Nor can the College, as it attempts to do, Pet. Bf. at 42-45, hide behind various state regulatory statutes that possibly could be construed to require discrimination against handicapped persons. The HEW regulation states:

> The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

45. Persons can benefit from educational programs without ever engaging in fields for which that education "prepared" them. For example, graduates of law school often do not choose to practice law.

45 C.F.R. §84.10(a)[46]

Section 504, as the regulation construes it, mandates that the College change its policies and practices. It thus requires the result reached by the court of appeals.

2. The Legislative History of Section 504

The legislative history of section 504 also demonstrates the correctness of the decision of the Court below. This history encompasses two years, beginning with section 504's initial introduction in 1971 as an amendment to the Civil Rights Act of 1964, and culminating in its passage as part of the Rehabili-

46. If state or local laws and section 504 conflict, the supremacy clause dictates that section 504 take precedence. Thus, state and local laws cannot be utilized as defenses to section 504 actions. U.S.Const. art. VI, cl.2. See,e.g., Rosenfeld v. Soutnern Pac. Co., 444 F.2d 1219, 1226 (9th Cir. 1971) (state statute conflicting with title VII).

tation Act of 1973, after having been twice vetoed because of cost concerns.[47]

In construing a statute so as to give effect to the intent of Congress, the purpose of the legislation must be looked to as well as its words. United States v. American Trucking Association, 310 U.S. 534, 543-44 (1940). For where the purpose of Congress is clear "that purpose must be upheld." Hudson Distributors v. Eli Lilly and Co., 377 U.S.386,395 (1964). In discovering the purpose of Congress, the

47. Introduction, 118 Cong. Rec.S525 (Jan. 20,1972), 117 Cong. Rec. H45974 (Dec. 9, 1971); additional co-sponsors, 118 Cong. Rec. S9495 (March 22, 1972); the incorporation of section 504 into the Rehabilitation Act, 118 Cong. Rec. S32310 (September 26, 1972); 119 Cong. Rec.H1531 (March 8, 1973); passage of the Rehabilitation Act of 1973, unanimously. 1973 Cong. Quar. Alm. 557, et seq. The 1974 amendments to the Act, which amended the definition of handicapped individuals for purposes of section 504 and other provisions of title V, were also vetoed and Congress similarly overrode that veto with near unanimity, 39 to 7 in the House,90 to 1 in the Senate. S. Rep. No. 1297, supra page 33, at 1.

courts look to the early history of a statute, Territory of Hawaii v. Mankichi, 198 U.S. 197, 211 (1903), the evil a statute was designed to remedy, Rector of Holy Trinity Church v. United States, 143 U.S. 457, 463, 465 (1392), the spirit of the legislation, United States v. Guaranty Trust Co., 280 U.S. 478,485 (1930), and its legislative history, FTC v. Mandel Brothers, 359 U.S. 385, 388 (1959).

The evil section 504 was intended to overcome was squarely put by Senator Robert Dole:

> The primary goal of this bill is to assist handicapped individuals in achieving their full potential for participation in our society. . . . I believe this bill reaffirms the Senate's dedication to the handicapped citizens of this Nation. The handicapped represent a large minority group who have suffered a great many injustices. They face what seem to many, insurmountable barriers. As a minority, the handicapped have always known exclusion--exclusion from an adequate opportunity to develop and contribute to their fullest capacity. We must make available the best possible programs to each handicapped American and assure the assistance he or she requires to fulfill their potential.

119 Cong. Rec. 24589-90 (1973) (emphasis provided). Thus, it is clear that Congress had in mind the same remedy it enacted for other minorities subjected to discrimination, when it passed title VI. Senator Taft of Ohio voiced a similar theme, when he noted in floor debate that "too many (handicapped persons) are under-employed--utilized in capacities well below the levels of their training, education, and ability." Id. at 24587.

Similar statements made concerning the purposes of the Rehabilitation Act of 1972 (passed, but vetoed by President Nixon), which was practically identical to the statute which became law in 1973, confirm the legislative intent. Representative Reid noted the need, "no matter how severe their handicap," to evaluate disabled persons on the basis of "their individual aptitudes and abilities."

118 Cong. Rec. 8977 (1972). Representative Brademus, Chairman of the House Select Committee on Education, stated that the Congress was acting to ensure that all disabled people would be judged on the basis of "their particular abilities," and to ensure that "none of our disabled citizens need to stagnate in any poorly paid, unproductive work which is less than they could undertake." Id. at 8976-77. And Senator Randolph, Chairman of the Senate Subcommittee on The Rights of Handicapped Persons, duly noted the expected significant impact of Section 504, opening opportunities to disabled persons heretofore thought to be beyond their capacities:

> I want to say to the handicapped Americans who will benefit so greatly from this legislation, that a new day is dawning for many of you. The Congress has awakened to your needs. We do now, and will continue to do so in the future protect and expand your horizons, and with your help, bring a new dimension of dignity, hope, and self-sufficiency to all handicapped individuals.

Id. at 35840 (emphasis provided).

In the Rehabilitation Act Amendments of 1974[48] Congress redefined the term "handicapped individual" as used as section 504, in order to clarify the scope of section 504's coverage. 29 U.S.C. § 706(6). In so doing, Congress underscored its intention in section 504 to reach all of the "many forms of potential discrimination" against handicapped individuals, S. Rep. No. 1297, supra p. 33, at 38, and to protect each and every disabled person, in every program which receives federal financial assistance. The Senate Labor and Public Welfare Committee stated in its Report:

> Special attention must be paid to the needs of those individuals who through no fault of their own have not received adequate education. These individuals, young adults and asults alike, must be afforded equal opportunity and access to higher educational services. The Committee is aware that

48. These amendments have "cogent significance in construing Section 504." Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1285 (7th Cir. 1977), citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969).

> at the present time most of these avenues are not open to individuals with handicaps....

Id. at 6408 (emphasis provided). Adoption of the College's position would assure the construction of newer, more resilient roadblocks, by educational programs nationwide, in contravention of this congressional intent.

3. The Rehabilitation Act and Its Legislative History

Section 504 is an intrinsic portion of a comprehensive legislative scheme that constitutes a new charter for disabled people. Petitioner is correct that the Rehabilitation Act as a whole, and its legislative history, informs the meaning of section 504. Pet. Bf. at 30 . See Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-417 (1975); Burnet v. Harmel, 287 U.S. 103, 108 (1932); United States v. Katz, 272 U.S. 354, 357 (1926).

In revamping the federal rehabilitation program, Congress acted to purge historic sterotypes of disabled people, and the prejudice that arises from them, and to mandate that historic patterns of discrimination be reversed; services be extended to severely disabled people; and severely disabled people be included in all facets of the national life. In short, Congress enacted an integration imperative.

In the vocational service provisions of the Rehabilitation Act of 1973, Congress worked a profound change in the law governing rehabilitation, reversed more than fifty years' practice in vocational rehabilitation, and required that priority in vocational rehabilitation services to be given to "those with the most

severe handicaps."[49] 29 U.S.C. § 701(1). See note 17 supra. For decades vocational rehabilitation services had been directed to the mildly disabled, reflecting the judgment that severely disabled people were incapable of benefiting from services and training programs that include postsecondary education programs.[50] Thus, it is conclusively demonstrated that Congress had firmly in its consciousness the counter-stereotype fact

49. The definition of "severe handicap" in the Act includes "deafness." 29 U.S.C. §706 (12).

50. Sponsorship for higher education services has been a part of the vocational rehabilitation program since 1943. See note 17, supra. Indeed, federal sponsorship of higher education programs for deaf persons dates back to the founding of Gallaudet College in 1860, at the same time as the founding of the initial land grant colleges.

that severely disabled persons such as hearing impaired persons can successfully participate in training programs, such as postsecondary education programs, of all types.[51] Leaving no room for gainsaying, Congress mandated as the very purpose of the Rehabilitation Act to "authorize programs to. . . promote and expand employment opportunities in the public and private sectors for handicapped individuals...." 29 U.S.C. §701(8) (emphasis pro-

51. Senator Cranston, in floor debate, noted that an inherent goal of the legislators was "to ensure full services to handicapped individuals and to better enable this program to serve individuals with the most severe handicaps. . ." 119 Cong. Rec.24566 (1973) (emphasis provided). And, Senator Stafford stressed that "this legislation can guarantee that many more individuals with severe handicaps will receive more responsive services than at present." Id. at 24563 (emphasis provided).

vided). The Act further mandated that grants be utilized by state agencies, to "meet the current and future needs of handicapped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities." Id § 720(a) (emphasis provided). A federal regulation enforcing the vocational service provisions of the Rehabilitation Act established standards for eligibility for vocational rehabilitation. "Employability" is defined by the federal regulation as

> a determination that the provision of vocational rehabilitation services is likely to enable an individual to enter or retain employment consistent with his capacities and abilities in the competitive labor market; the practice of a profession; . . .

45 C.F.R.§ 1361.1(g) (1975) (emphasis provided). See also id. §§ 1361.33(b), 1361.1(s), 1361.1(bb). The Federal Rehabilitation Services Administration Manual, which constitutes the official interpretation of the

statute and regulation,[52] further explains the philosophy of the overall program:

> Disabled individuals who are working substantially below their potential should be provided vocational rehabilitation services to help them engage in occupations more consistent with their capacities and abilities. Their potential, interests, and desires should be determined and then programs developed which will help them reach suitable employment goals.

Rehabilitation Services Administration, Program Regulation Guide No. 77-4, §1505.03 (b) (Jan. 19, 1977) (emphasis provided). See also id. No. 77.4, § 1505.03 (c) (Jan. 19,1977); No. 24-2-8, § IV (C) (June,1971). It is somewhat ironic to note that the various statutory provisions, regulations, guidelines and legislative history, clearly evince a Congressional purpose to guarantee that state rehabilitation agencies provide the type of educational program now being

52. See Florida Dept. of Health and Rehabilitation Services v. Califano, 449 F. Supp.274, 282 (N.D.Fla.1978).

denied to Ms. Davis by the petitioner. As Senator Stafford indicated on the floor of the Senate:

> Simply stated, the goal of this new law is to help handicapped individuals to achieve their full potential of participation within our society. The Senate-House Conference Committee, I think, has worked out a significant step forward in our vocational-rehabilitation programs that are well worthy of becoming law. . . . There are an estimated 7 to 12 million handicapped individuals in our Nation who have not realized their potential. . . .

118 Cong. Rec.35841 (1972) (emphasis provided). The Senate Committee on Labor and Public Welfare pointed to the similarities between the 1972 bill, and the Act passed in 1973:

> Inherent in the purpose of the prior legislation were changes designed to provide flexibility in the basis vocational rehabilitation program to ensure full services to handicapped individuals and to better enable this program to serve individuals with the most severe handicaps. Believing that it was necessary to emphasize that the final goal of all rehabilitation services was to improve in every possible respect the lives as well as the livelihood of individuals served, the Committee placed particular emphasis on

> developing a method of providing services which would be responsive to individuals needs. . . .

S. Rep. No. 318, 93d Cong., 1st sess., reprinted in 1973 U.S. Cong. & Ad.News 2076, 2078-79 (emphasis provided.)[53]

The 1978 amendments to the Rehabilitation Act further emphasize the need to enable handicapped persons to achieve full participation in life and society. They establish and fund a National Institute of Handicapped Research as well as public education programs highlighting ways of providing for the rehabilitation of handicapped persons. Pub. L. No. 95-602, §§ 107, 109(4), 92 Stat. 2962-65 (to be codified at 29 U.S.C. §§ 760, 761a)

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53. The sole court case interpreting the service delivery provisions of the Rehabilitation Act reads those provisions to require services based on individual needs, and casts in doubt administrative classifications and general resource allocations that tend to exclude handicapped persons from particular services. Scott v. Parham, 422 F. Supp. 111 (N.D.Ga.1976).

Nov. 6, 1978). These amendments expand the definition of "vocational rehabilitation services" to include as an inherent part of sponsorship for higher education and other training programs, the provision of recording materials for blind persons and, significantly, captioned films and video cassettes for deaf persons. Id. at § 104, 92 Stat. 2960, amending 29 U.S.C. § 723. In addition, training grants are provided for the expansion of reader services for blind persons and interpreter services for deaf persons. Id. at § 116, 92 Stat. 2975 (to be codified at 29 U.S.C. §§ 777c-e).

Senator Randolph, one of the co-sponsors of the 1978 amendments, explained on the floor of Congress that the legislature deemed it essential to provide these additional programs as "necessary support services" since "every severely handicapped person is

entitled to an opportunity to develop to the greatest extent possible." 124 Cong. Rec. S15548 (Sept. 20, 1978).[54]

54.

The Education Acts of 1974 and 1975, 20 U.S.C. §§ 1401, et seq., are premised in the same congressional finding about the competences of severely disabled people. Both Education Acts recognize individualization as a necessary condition of learning, growth and development by disabled people, e.g., 20 U.S.C. § 1421(4), place a priority on service to children with the most severe handicaps, e.g.,20 U.S.C. §1412(e); 121 Cong. Rec. S10961; 121 Cong. Rec. H11353, and both state their own integration requirement, based upon the same findings and with similar purposes as section 504's integration imperative: that, to the maximum extent appropriate, handicapped children, including children who are in public or private institutions or other care facilities, [shall be] educated with children who are not handicapped.... 20 U.S.C. § 1412(5). For the purposes of primary and secondary education programs, at least, these two statutes and section 504 are to be read together. Kruse v. Campbell, 431 F.Supp. 180, 185-86 (E.D. Va.) (three-judge court) vacated and remanded for decision on section 504, rather than constitutional

In addition, the same Congress that initially adopted section 504, in section 501 and 503 of title V of the Rehabilitation Act of 1973 required that executive agencies of the federal government and government contractors,[55]

grounds, 98 S.Ct. 38 (1977). See also HEW 504 Regulation, Analysis, 42 Fed. Reg. 22690 (May 4, 1977).

The Congressional purpose to pierce the stereotype that severly disabled children cannot be integrated into normalized settings is evident throughout the legislative history. See 121 Cong. Rec. S10960 (remarks of Sen. Randolph); id. at S10961 (remarks of Sen. Strafford); id. at S10981 (remarks of Sens. Cranston & Mondale); id. at S10977 (remarks of Sen. Dole); id. at H 11350 (remarks of Rep. Michel); id. at H11351 (remarks of Rep. Daniels). See also The Realization of the Least Restrictive Educational Environments for Severely Handicapped Students, 2 The American Association for the Education of the Severely and Profoundly Handicapped Review 195-201 (1977).

55.

Section 503, 29 U.S.C. §793, closely follows Executive Order No. 11246, 3 C.F.R. 173, 42 U.S.C. §2000e-z (notes) and its

respectively, take affirmative action to employ disabled people, including severely disabled people. 29 U.S.C. §§ 791, 793. These provisions prohibit employers from denying jobs to disabled persons because of the same types of stereotyped assumptions that are at the root of petitioner's exclusionary policy.

The Rehabilitation Act and its legislative history confirm that the Congress intended section 504 to charter a new status for disabled people and affirmatively to require that disabled people, especially severely dis-

predecessors requiring affirmative action to achieve nondiscrimination by federal contractors on grounds of race. See, e.g., Contractors Assn. v. Secretary of Labor, 311 F.Supp. 1002, 1009 (E.D.Pa. 1970), aff'd, 442 F.2d 159 (3d Cir. 1971).

abled people, be included in every aspect of national life. This purpose was best articulated by the Congress itself in the White House Conference on Handicapped Individuals Act, section 301(6), enacted December 7, 1974:

> The Congress find that...it is essential that recommendations be made to assure that all individuals with handicaps are able to live their lives independently and with dignity, and that the complete integration of all individuals with handicaps into normal community living, working and service patterns to be held as the final objective.

29 U.S.C. § 701 note.

4. The Cases Enforcing Section 504

Since 1973, the federal courts have construed and enforced section 504 to the same effect as the Court of Appeals below.

The first judicial construction of section 504 was Gurmankin v. Costanzo,

411 F. Supp. 982 (E.D. Pa. 1976), in which the plaintiff challenged a school district policy of exclusion of visually handicapped individuals. Id.at 983, 985. Even though it was conceded that Ms. Gurmankan had "all the academic qualifications and requisites for teaching," the defendants refused her a position because of their "concern with her ability to operate in emergency situations requiring sight and agility." Id at 987. The Court made findings of fact that the evaluation of Ms. Gurmankin "was based, at least in part, on misconceptions and stereotypes about the blind and on assumptions that the blind simply cannot perform";that "unequal treatment accorded the blind is the result of misconceptions and myths held by sighted persons about the blind"; that the "examiners for Ms. Gurmankin ... had had no prior contact with blind teachers or blind applicants for teaching positions," nor "did they undertake any special preparations to become better

informed of the problems, or capabilities of blind teachers"; and that "[s]ighted persons may make erroneous assumptions of the abilities of blind persons." Id. at 985-87. Based on these findings, the court rejected the defense based upon safety concerns, found it "clear that a refusal to hire a blind person as a teacher is the kind of discrimination which [Section 504] was meant to prohibit," and ordered the hiring of Ms. Gurmankin. Id. at 989. A unanimous court of appeals affirmed this decision. 556 F.2d 184 (3d Cir. 1977).[56]

Duran v. City of Tampa is to the same effect. There, an applicant for a police officer opening was denied employment because of safety concerns arising from his history of epileptic seizures. On a motion for a

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56. Reaching the constitution, the court of appeals held that the district policy created a "presumption that blind persons could not be competent teachers, in violation of due process." 556 F.2d at 187.

preliminary injunction, the court indicated that the city's actions, based, as in Ms. Davis' case, solely upon a record of a physical examination, constituted discrimination under section 504. 430 F. Supp. 75, 78 (M.D. Fla. 1977). Following a trial, the court issued an order in which the city was "directed not to consider" the applicant's disability "as a disqualifying medical condition." 451 F. Supp. 954, 955 (M.D. Fla. 1978).

In another employment case, Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978), rehabilitated drug addicts were denied jobs because of their medical conditions. The court ordered the employer to evaluate the abilities of the applicants without regard to their disabilities, and, with a cite to the pre-employment inquiry prohibition of the HEW regulation, stated that the employer had "denied them the benefits of a program receiving federal financial assistance ... in direct violation of the Act." Id. at

796-97.

The section 504 employment cases[57] thus make clear that courts will not rubber stamp conclusory assertions regarding

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57. See also Drennan v. Phila. Gen. Hosp., 428 F. Supp. 809, 814-14 (E.D. Pa. 1977) (applicant denied employment as a nurse-anesthetist stated a valid cause of action under sections 503 and 504); Whitaker v. Bd. of Higher Educ., 461 F. Supp. 99, 106-09 (E.D. N.Y. 1978) (college's denial of tenure to professor on basis of disability stated valid cause of action under section 504).

Cases decided under various state non-discrimination statutes are to the same effect. In Boynton Cab Co. v. Dep't of Ind., Labor & Human Relations, 18 E.P.D. ¶ 8819 (1978), the Wisconsin Court of Appeals affirmed an agency determination that the cab company discriminated in its refusal to hire, for reasons of safety, an applicant who had had one of his arms amputated. The court noted that the company should have focused upon the applicant's ability to safely drive a car, rather than drawing conclusions from the nature of his disability.

In Connecticut Institute for the Blind v. Comm'n. on Human Rights, 18 E.P.D. ¶ 8815 (1978), a unanimous Connecticut Supreme Court reversed an agency determination that a visually disabled person could not safely supervise young children with their own severe multiple disabilities. The court noted that the employer's exclusion "without examination of individual capabilities," and "without any effort to define the specifications of the position of teacher's aide or to test the capacities of the complainant for that position, cannot stand."

Similarly, in Fraser Shipyards v. Dep't of Ind., Labor, & Human Relations, 13 F.E.P.

the inability of disabled persons to safely and effectively perform in a wide range of educational programs and activities.[58]

Cases 1809 (1976), the court found discriminatory a refusal to hire diabetics as welders. The employer's contention that because some diabetics might present a hazard to other employees, all diabetics could be disqualified from potential employment as welders in that industry, was held to be "precisely the type of rationale that the Wisconsin Fair Employment Law is designed to overcome."

58. The College's reliance on the ADEA bfoq cases in this regard is misplaced. See Hodgson v. Greyhound Lines, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975); Usery v. Tamiami Trail Tours, 531 F.2d 224 (5th Cir. 1976), both cited in Pet. Bf. at 46. First, the rationale of Greyhound and Tamiami has been seriously undermined by later cases, all of which have demanded strict proof of causal relationships between age and inability to safely perform job-related tasks, in a wide variety of jobs. See, e.g., Houghton v. McDonnell Douglas Corp., 553 F.2d 561, 564 (8th Cir.) (Clark, Cir. J.), cert. denied, 434 U.S. 966 (1977) (test pilots); Rodriguez v. Taylor, 428 F. Supp. 1118 (E.D. Pa. (1976) (police officers). Second, even if the Court were inclined to follow Greyhound and Tamiami, those cases are distinguishable, in that their respective trial courts received massive quantities of evidence indicating both mental and psychological changes inherent with aging precluded safe performanance of particularized essential job tasks,

In terms, specifically, of educational programs and activities, the discriminatory exclusion of disabled students in the course of initial admissions procedures also has been judicially recognized, albeit in the context of primary and secondary, rather than post-secondary education, as a violation of section 504. In Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va, 1976), the plaintiff child, Trina Evet Hairston, "was not wanted in the regular classroom," Id. at 182, because of her spina bifida condition. The

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and that individual testing of all applicants over forty was not possible. In terms of specific proof, even those courts demanded that "the safety factor...be evaluated in terms of the possibility or likelihood" of someone being injured. 531 F. 2d at 237. Contrast the case before the Court, in which the College has failed to identify essential abilities necessary to participate safely in its educational program, failed to test Ms. Davis' abilities to so participate, and failed to consider the impact of the provision of academic adjustments, or auxiliary aids, on those abilities, as required by the HEW regulation.

court determined, as a finding of fact, that:

> The needless exclusion of students who are able to function adequately from the regular classroom situation would be a great disservice to these children. A child's chance in this society is through the educational process... This conclusion is further enforced by the critical importance of education in this society.

Id. at 182.[59] Based upon this determination,

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59. This language is reminiscent of that used by this Court in Brown v. Board of Education, 347 U.S. 483, 494 (1954), when it determined that the exclusion of blacks from educational programs involving "others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The mandate for integration of disabled students in higher education programs clearly is based on the premises accepted by the Court in Brown. Indeed, many of the cases that paved the way for Brown dealt with higher education. Four years before the Brown opinion, the Court, in Sweatt v. Painter, 339 U.S. 629 (1950), began speaking about educational opportunity in relation to race discrimination in post-secondary institutions. The case was brought by a black student excluded from the University of Texas Law School. The Court ordered that the student be admitted. To deny the student the right to attend would have robbed him of the opportunity to participate in the educational experience on par with white students. Id. at 634. See also McLaurin v. Oklahoma Board of Regents, 339 U.S. 637 (1950); Sipuel v. University of

the court held that the exclusion from the school based upon a stereotyped conception of the abilities of a person with spina bifida was a violation of section 504 and concluded that

> To deny to a handicapped child access to a regular public school classroom in receipt of federal financial assistance without compelling educational justification constitutes discrimination and a denial of benefits of such program in violation of the statute.

Id. at 184[60]

The guarantee of equal educational opportunities under section 504 and the need for safety in the classroom recently collided in the context of the on-going litigation involving the rights of mentally retarded

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Oklahoma, 332 U.S. 631 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

60. Accord, Doe v. Marshall, 459 F. Supp. 1190 (S.D. Tex. 1978); Howard S. v. Friendswood Indep. School Dist., No. G78092 (S.D. Tex. 1978, June 23, 1978); Rhode Island Society for Autistic Children v. Board of Regents, No. 5081 (D.R.I., Aug. 1, 1975). See also Fialkowski v. Shapp, 405 F. Supp. 946 (E.D. Pa. 1975).

children institutionalized at the Willowbrook Developmental Center in Staten Island, New York. The state had entered into a consent judgment in which the children were to be placed in more normalized settings, which included attending school with non-handicapped children. See New York State Association for Retarded Children v. Carey, 357 F.Supp.752 (E.D.N.Y.1973) (findings); 393 F.Supp.715 (E.D.N.Y.1975)(order). When it was discovered that several of the retarded children had acquired the disease Hepatitus B while residing at the institution, the New York City Board of Education decided to exclude these children from the public schools because of the possibility of contagion. New York State Association for Retarded Children v. Carey,Nos. 72-C-356-57 (E.D.N.Y., Sept. 14, 1978), at 1-3. Despite the testimony of medical doctors to the effect

that there was some real risk of contagion, the court held that section 504 requires that the handicapped children be admitted to the integrated program where

> the risk . . . is not substantial enough to justify their discriminatory exclusion from public school. The risk of contagion cannot be ignored, but their are prophylactic measures . . . which can be taken in order to reduce the risks to a de minimus level. It is not necessary to close the schoolhouse door to these children.

Id. at 17.

In response to this holding the Board of Education formulated a new plan, this time segregating the affected children within the public schools, arguing that the risk of contagious contacts was enhanced by the maladaptive behavior of the retarded children. Concluding that the Board "once again overreacted," the court indicated that section 504 required individual determinations "that each of the 48 carriers actually engages in such contacts or ... any other of the constel-

lation of factors involved in the transmission of Hepatitis B ..." New York State Association for Retarded Children v. Carey, Nos. 72-V-356-57 (E.D.N.Y., Feb. 28, 1979). Thus, on the court's construction the Board of Education failed to show that the students could not safely participate in the integrated classroom setting.

As with the petitioner in this case, the fatal error of the Board of Education was its failure to make any individualized determinations with regard to the amount of safety deemed requisite and the inability of the disabled student to meet that standard. The Board of Education "overreacted" to an unjustified fear of harm to other students just as the college based its decision on a sterotyped conception of the abilities of hearing impaired person.

Thus, the education cases also demonstrate that the consistent judicial construction of section 504 is congruent with that of the court of appeals below. Decisions such as the one denying admission to Ms. Davis are often unconsciously made because of sterotyped assumptions about the capabilities of disabled persons. Similarly, the district court below fell "into the trap of assuming that the Act permits ancient canards about the proper role" of disabled persons to be a basis for discrimination. Phillips v. Marietta Corp., 400 U.S. 542, 545 (1975) (Marshall, J., concurring). Before section 504 was passed, a college could fashion its admissions criteria "on the basis of assumptions about the differences" of disabled persons, "whether or not the assumptions were valid. [But i]t is now well recognized that....decisions cannot be predicated on mere stereotyped

impressions about the characteristics" of disabled persons. Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702,707 (1978)[61]

The College has failed to meet even its most minimal burden of identifying essential abilities necessary for participation in the nursing program. Certainly concerns about hazards to Ms. Davis herself, Pet. Bf. at 45, "do not touch upon the essence" of the education program. Burwell v. Eastern Airlines,

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61. Federal courts have consistently struck down classifications based upon sterotyped assumptions regarding the capacity of women to perform, in the context both of admissions policies of educational institutions, Berkelman v. San Francisco Unified School Dist., 501 F. 2d 1264 (9th Cir. 1974) (different admissions standards for females violate title IX); Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972) (different admissions standards utilized because of assumptions about suitable and proper fields for women); and hiring practices of employers, Gillin v. Federal Paper Bd. Co., 479 F.2d 97, 102 (2d Cir. 1973); Jurinto v. Edwin L. Wiegand Co., 477 F.2d 1038, 1044 (3d Cir. 1973); Bowe v. Colgate-Palmolive Co., 416 F. 2d 711, 717 (7th Cir. 1969); Vogel v.

18 E.P.D. ¶ 8759, at 5082 (N.D.Va. 1978). As this Court held in Dothard v. Rawlinson, 433 U.S.321, (1977), "the argument that a particular job is too dangerous" is rebutted by the purpose of section 504 "to allow the individual to make that choice for herself."[62]

Further, the College, at trial, failed to show that Ms. Davis could not safely and effectively perform the

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TWA, 346 F. Supp. 805, 819 (W.D. Mo. 1971); Cheatwood v. South Central Bell Tel.& Tel. Co., 303 Supp. 754, 758-59 (M.D. Ala. 1969).

62. This principle has been recognized in the disability discrimination context. See Borden v. Rohr, No. C2-75-844 (S.D.Ohio, Dec. 30, 1975) (ordering college to permit the playing of contact sports by a student blind in one eye); Chicago, St.Paul & Pacific R.R. Co. v. Wisconsin Dept. of Ind., Labor & Human Relations, 4 E.P.D.¶ 7573 (1971), modified on other grounds, 62 Wis. 2d 392, 215 N.W. 2d 443 (1974) (refusing to allow employer to dismiss asthmatic worker on basis that fumes in work area endangered employee's health). See also Kampmeir v. Nyquist, 553 F.2d 296, 300 n. 9 (2d Cir. 1977).

essential functions of the nurse training program. First, the College never delineated a list of essential functions, but instead indulged in a recitation of job situations, such as very narrow operating room procedures, which might be altered or safely performed with the use of auxiliary aids. Second, it never considered the possibility of adapting these functions. Third, it never considered the impact of the use of auxiliary aids in enabling Ms. Davis to perform these functions. Fourth, even assuming that the College is correct--and it is not--in presuming that Ms. Davis could not perform in certain registered nurse positions, the College never showed that the same essential functions are required to safely and effectively perform in the nurse training program. Fifth, the College never considered the possibility of modifying course requirements as a function of the requirement of academic adjustment.

Sixth, the College never considered the impact of the use of auxiliary aids in enabling Ms. Davis to safely and effectively complete the educational program. Finally, the College officials produced no evidence correlating any required abilities "with the requisite amount of safety thought essential." Dothard v. Rawlinson, 433 U.S. at 331.[63] Thus, it is clearly required that the College

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63. The College now attempts to assert in its argument that the requirements for a student are coextensive with those of a registered nurse. Pet. Bf. at 34. Furthermore, it attempts to construct new situations in which Ms. Davis might not be able to perform, Pet. Bf. at 44. There is no basis for these contentions in the record, and "a reviewing court is not ordinarily justified in relying on arguments in favor of a ... qualification that were not presented to the trial court." Dothard v. Rawlinson, 433 U.S. at 340. (Rehnquist, J., concurring).

In addition, the College's reliance, as persuasive authority, upon a 1962 nursing textbook, Pet. Bf. at 45-46, is at best, questionable. Even if what is thought to be good practice has not changed somewhat in seventeen years, it is well-settled that

identify specific requisite abilities essential to its educational programs. The College has failed to meet this requirement. Further, this Court has consistently held that once those abilities are specified, a further requirement of the College is that:

> (its) purpose...be achieved by adopting and validating a test for applicants that measures (those abilities) directly. Such a test would fully satisfy the standards of the statute because it would be one that "measure(s) the person for the job and not the person in the abstract"...But nothing in the present record even approaches such a measurement.

Id. at 332, quoting Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (Burger, Ch.J.). If petitioner, and other colleges across the country, are permitted to indulge in traditional assumptions about the abilities of disabled persons and are not put to the test of proving that these assumptions are justified

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usual practices of others in a profession cannot itself justify discriminatory practices. See, e.g., Robinson v. Lorillard Corp., 444 F.2d 791, 799-800 (4th Cir.), cert. denied, 404 U.S. 1006 (1971)

by the facts, section 504 will have virtually no impact on discrimination. As with title VI, however, Congress required individualized, factual based determinations. "In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs" on the basis of their disabilities. Regents v. Bakke, 98 S. Ct. at 2814 (Stevens,J.). See also id. at 2761 (Powell, J.) ("Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.").

Section 504 makes it unlawful to discriminate against any handicapped individual. As this Court noted in Los Angeles Department of Water and Power v. Manhart, 435 U.S. at 708, 709 (1978),

> The question, therefore, is whether the existence or nonexistence of "discrimination" is to be determined by comparison of class characteristics or individual characteristics. A "stereotyped" answer to that question may not be the same as the answer which the language and purpose of the statute command....The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a...class ...Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply... . Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices which classify . . . tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.

This requisite "thoughtful scrutiny" surely was not given Ms. Davis. Indeed the decision of the College was grounded instead upon "their feelings," 424 F.Supp. at 1343, ¶9, that she would be unable to perform, based upon their reading of a bare medical record.[64] The College can-

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64. Amicus Equal Employment Advisory Council seriously distorts the record when it states in its brief, at 16-17 n.11, that the

not be permitted to substitute justification and rationalization for specific factual determination of Ms. Davis' inability[65] to participate in its program.

"college...gave Ms. Davis an individual examination to determine the probable impact of her hearing disability on her ability to function as a student nurse and, ultimately, as a registered nurse." It must be pointed out that the audiologist who performed the examination made no recommendation with regard to Ms. Davis' ability to participate in the nursing program. The College personnel based "their feeling" solely on the report itself, without any analysis of Ms. Davis' abilities. Nor can "their feeling" be looked upon as "the probable impact." Nor did "their feeling" pertain to the student program, but only to employment as a registered nurse.

65. This principle, specifically with regard to disabled persons, finds constitutional support. The twenty-fifth amendment concerns the removal of a handicapped President from office. If it should arise that a handicapped President "transmit... his written declaration that no inability exists," then the cabinet officers and, ultimately, Congress must decide whether "the President is unable to discharge the powers and duties of his office...." U.S. Const. amend. XXV, § 4 (emphasis added). Thus, if such a strict standard is imposed on the Congress for the removal of a handicapped President, responsible for the safety of 200 million Americans, not to mention our allies overseas, Southeastern Community College can be required to do no less.

Although "[p]rocedure by presumption is always cheaper and easier than individualized determination," Stanley v. Illinois, 405 U.S. 645, 656 (1972), section 504 forbids generalizations, even those based upon otherwise accurate medical reports. The College certainly may reason its admissions decisions on concerns of ability to safely perform; here, however, petitioner's procedure is invalid because of its "discriminatory application of such a reason." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973).[66]

Assumptions about the influence of a

66. Under the McDonnell Douglas test, the College has not even met its initial burden of rebutting the presumption that Ms. Davis disability itself played the determining role in its decision to refuse her admission. 411 U.S. at 802-805. However assuming that it successfully did put forth a discriminatory reason for its decision, that reason certainly was "discriminatory [in its] application." Id. at 806.

disability on a person's ability to perform are at the core of discrimination based upon disability. See pages 35-40 supra. College admissions criteria must evaluate the actual abilities of disabled persons without superimposing stereotyped conceptions of those abilities. Otherwise, admissions criteria will create "build-in headwinds" for disabled applicants. Griggs v. Duke Power Co., 401 U.S. at 432. The only way to change these attitudes toward disabled persons is through direct contact. Such contact will occur only if section 504 is enforced in such a way as to compel colleges to adopt practices that ignore the sterotyped images of disabled persons.

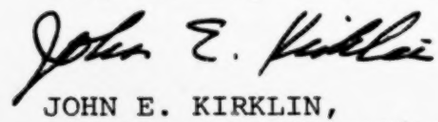
Thus the decisions of this court, when read together with the consistent construction of section 504 by the lower federal courts, lead to the inescapable

conclusion that the holding of the court below was correct.

CONCLUSION

The decision of the court of appeals should be affirmed, and the cause remanded to the district court for a determination of respondent's ability to safely and effectively participate in petitioner's educational program.

Respectfully submitted,



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